

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ
MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendant.

:
: Index No. 653118/2014

:
: Judge Jennifer Schechter

:
: Motion Seq. No. ____

-----X
KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ
MONEY, INC., and PRESCRIPTION SONGS, LLC, and
DOES 1 – 25, inclusive,

Counterclaim - Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND	2
I. Gottwald Discovers Defendant And Signs Her To An Exclusive Recording Deal	2
II. Defendant's First Attempt To Terminate The KMI Agreement	3
III. Defendant Enjoys Enormous Success Working With Gottwald	4
IV. After Her Rise To Stardom, Defendant Begins To Make Demands On Gottwald And Breaches Her Contracts	5
V. When Defendant's Contract Demands Were Not Met Through Negotiations, Defendant And Her Representatives Begin A Campaign of Defamation And Extortion To Pressure Gottwald To Capitulate	8
VI. Defendant Embarks Upon A Calculated "Press Plan" Of Negative Publicity To Ruin and Pressure Gottwald, Defendant Files The Sham California Complaint (Now Voluntarily Dismissed)	10
VII. Defendant Never Had Any Intention To Ever Have to Prove Her Rape Claim	14
VIII. Defendant Falsely Asserts That Gottwald Raped Another Recording Artist	15
APPLICABLE LEGAL STANDARDS	15
ARGUMENT	16
I. Plaintiffs Are Entitled To Partial Summary Judgment With Respect To Their Second Cause Of Action For Defamation	16
II. The Statements Made By Mark Geragos And Sunshine Sachs That Gottwald Raped And Drugged Defendant Were Made In Their Capacity As Defendant's Agents	18
A. Geragos And Sunshine Sachs Had Actual Authority To Publish Defendant's Defamatory Statements	19
B. Defendant Ratified The Statements Of Geragos And Sunshine Sachs	22
III. It Is Undisputed That Pebe Sebert Was Acting As Defendant's Agent In Publishing Certain Statements Alleged In The TAC	22
IV. Plaintiffs Are Entitled To Summary Judgment Dismissing Defendant's First Amended Counterclaim For Declaratory Relief	23
A. Defendant's "Election of Remedies" Legal Argument Is Meritless	24

TABLE OF CONTENTS
(continued)

	<u>Page</u>
B. Defendant Has Not Been Substituted For KMI Under The RCA Agreement	24
V. KMI Is Entitled To An Award Of Prejudgment Interest On Late Royalty Payments	26
VI. Many of Defendant's Affirmative Defenses to Plaintiffs' Defamation Claims Fail As A Matter Of Law	29
A. Defendant's Defamatory Statements Are Not "Protected Opinion"	29
B. Defendant's Defamatory Statements Are Not "Rhetorical Hyperbole"	30
C. The Statute of Limitations Does Not Bar Plaintiffs' Defamation Claims	31
D. CPLR § 3016 Does Not Bar Plaintiffs' Defamation Claims	31
E. Defendant's "Libel-Proof Plaintiff" Defense Fails As A Matter Of Law	32
VII. Many Of Defendant's Contract-Related Affirmative Defenses Fail As A Matter Of Law	33
A. The Statute of Limitations Does Not Bar Any of Plaintiffs' Contract Claims	33
B. Defendant's Impossibility Affirmative Defense Fails as a Matter of Law	34
C. Defendant's Seven Year Rule Defense Fails as a Matter of Law	34
D. Defendant Cannot Establish that the KMI Agreement or the Prescription Agreement Is Unconscionable	35
E. Defendant Cannot Establish Her Purported Fraudulent Inducement Defense	36
CONCLUSION	37

TABLE OF AUTHORITIESPage(s)

CASES

<i>A.H.A. Gen. Constr. v. N.Y.C. Hous. Auth.</i> , 92 N.Y.2d 20 (1998)	26
<i>Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assocs. L.L.C.</i> , 72 A.D.3d 456 (1st Dep't 2010)	35
<i>ALG Trading Corp. v. Valero Gas Mktg., L.P.</i> , 254 A.D.2d 117 (1st Dep't 1998)	23
<i>Alvarez v. Prospect Hosp.</i> , 68 N.Y.2d 320 (1986)	16
<i>American Soc. of Mech. Eng'rs. v. Hydrolevel Corp.</i> , 456 U.S. 556, 102 S.Ct. 1935 (1982)	20
<i>City of N.Y. v. Coastal Oil New York, Inc.</i> , 2000 WL 648365 (S.D.N.Y. May 18, 2000)	28
<i>Clark v. Bristol-Myers Squibb and Co.</i> , 306 A.D.2d 82 (1st Dep't 2003)	22
<i>Da Silva v. Time Inc.</i> , 908 F. Supp. 184 (S.D.N.Y. 1995)	32
<i>Dabriel, Inc. v. First Paradise Theaters Corp.</i> , 99 A.D.3d 517 (1st Dep't 2012)	35
<i>Danka Office Imaging Co. v. Gen. Bus. Supply, Inc.</i> , 303 A.D.2d 883 (3d Dep't 2003)	28
<i>DeBlasio v. N. Shore Univ. Hosp.</i> , 213 A.D.2d 584 (2d Dep't 1995)	17
<i>Epifani v. Johnson</i> , 65 A.D.3d 224 (2d Dep't 2009)	16, 18
<i>Fresh Del Monte Produce Inc. v. Del Monte Foods Co.</i> , 933 F. Supp. 2d 655 (S.D.N.Y. 2013)	28
<i>Galasso, Langione, & Botter, LLP v. Galasso</i> , 53 Misc. 3d 1202(A) (N.Y. Sup. Ct. 2016)	20

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Gillman v. Chase Manhattan Bank</i> , 73 N.Y.2d 1 (1988)	35
<i>Gjonlekaj v. Sot</i> , 308 A.D.2d 471 (2d Dep’t 2003)	29
<i>Global Minerals & Metals Corp. v. Holme</i> , 35 A.D.3d 93 (1st Dep’t 2006)	36
<i>Gross v. New York Times Co.</i> , 82 N.Y.2d 146 (1993)	17, 29, 30
<i>Hallock v. State</i> , 64 N.Y.2d 224 (1984)	20
<i>Hoffman v. Landers</i> , 146 A.D.2d 744 (2d Dep’t 1989)	30
<i>In re Hoffman</i> , 275 A.D.2d 372 (2d Dep’t 2000)	27
<i>Indosuez Int’l Fin. B.V. v. Nat’l Reserve Bank</i> , 98 N.Y.2d 238 (2002)	22
<i>James v. DeGrandis</i> , 138 F. Supp. 2d 402 (W.D.N.Y. 2001)	32
<i>Jewell v. NYP Holdings, Inc.</i> , 23 F. Supp. 2d 348 (S.D.N.Y. 1998)	32
<i>Kagan v. HMC-N.Y., Inc.</i> , 100 A.D.3d 468 (1st Dep’t 2012)	27, 28
<i>Kamchi v. Weissman</i> , 125 A.D.3d 142 (2d Dep’t 2014)	29
<i>Lebedev v. Blavatnik</i> , 144 A.D.3d 24 (1st Dep’t 2016)	33
<i>Leumi Fin. Corp. v. Richter</i> , 24 A.D.2d 855 (1st Dep’t 1965), <i>aff’d</i> 17 N.Y.2d 166 (1966)	16
<i>Maurillo v. Park Slope U-Haul</i> , 194 A.D.2d 142 (1st Dep’t 1993)	19

TABLE OF AUTHORITIES**(continued)****Page(s)**

<i>Mazursky Grp., Inc. v. 953 Realty Corp.</i> , 54 Misc. 3d 1221(A), 54 N.Y.S.3d 610 (N.Y. Sup. Ct. 2017).....	36
<i>Meisel v. Grunberg</i> , 651 F. Supp. 2d 98 (S.D.N.Y. 2009).....	22
<i>Montchal v. Northeast Sav. Bank</i> , 243 A.D.2d 452 (2d Dep't 1997)	37
<i>Murray v. Watervliet City Sch. Dist.</i> , 130 A.D.2d 830 (3d Dep't 1987)	19
<i>Nadar & Sons, LLC v. Shavolian</i> , 113 A.D.3d 432 (1st Dep't 2014)	26
<i>Nastro Contr., Inc. v. Agusta</i> , 217 A.D.2d 874 (3d Dep't 1995)	37
<i>O'Connell v. Macy's Corp. Servs., Inc.</i> , 154 A.D.3d 628 (1st Dep't 2017)	19
<i>Polyfusion Elecs., Inc. v. Promark Elecs., Inc.</i> , 108 A.D.3d 1186 (4th Dep't 2013).....	27
<i>Rossi v. Attansao</i> , 48 A.D.3d 1025 (3d Dep't 2008)	30
<i>Silsdorf v. Levine</i> , 59 N.Y.2d 8 (1983)	29
<i>Solow Mgmt. Corp. v. Tanger</i> , 43 A.D.3d 691 (1st Dep't 2007)	28
<i>Stern v. Cosby</i> , 645 F. Supp. 2d 258 (S.D.N.Y. 2009).....	32, 33
<i>Stevenson v. Cramer</i> , 151 A.D.3d 1932 (4th Dep't 2017).....	19
<i>Thomas H. v. Paul B.</i> , 18 N.Y.3d 580 (2012)	30
<i>Wachovia Sec., LLC v. Joseph</i> , 56 A.D.3d 269 (1st Dep't 2008)	35

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Zuckerman v. City of N.Y.</i> , 49 N.Y.2d 557 (1980)	15, 16
 STATUTES AND RULES	
California Labor Code § 2855	34
California Rule of Professional Conduct 3-500	20
New York Consolidated Laws, Civil Practice Law and Rules (“CPLR”)	
§ 213(2)	33
§ 215(3)	31
§ 3016	31
§ 3212	15
§ 5001	27, 28, 29
New York Rule of Professional Conduct 1.4(a)	20
 OTHER AUTHORITIES	
Rest. 3d Agency, § 4.03 (3rd 2006)	22

PRELIMINARY STATEMENT

Plaintiffs Lukasz Gottwald (“Gottwald”), Kasz Money, Inc. (“KMI”), and Prescription Songs, LLC (“Prescription Songs”) (together, “Plaintiffs”) respectfully submit this Memorandum of Law in Support of their Motion for Partial Summary Judgment on certain undisputed matters on their claims for defamation and breach of contract. Because Plaintiffs recognize that many fact disputes exist that are within the province of a jury,¹ they have been mindful to only seek disposition on issues that can narrow the case for trial and are based on undisputed facts. Plaintiffs indeed look forward to presenting their case to the jury, before this Court, to demonstrate the grave and lasting damage that has been inflicted on them by Defendant’s malicious campaign to destroy Plaintiff Gottwald with her false, sham accusations of being drugged and raped in 2005.

Plaintiffs’ summary judgment motion also largely focuses on issues that Defendant already should have conceded. First, Plaintiffs seek summary judgment on the element of falsity as to Defendant’s defamatory statement that Gottwald raped Katy Perry. Even though it is an undisputed fact that this statement is false, Defendant refuses to acknowledge its falsity. Second, Defendant refuses to concede that her *own lawyer*, Mark Geragos, was her agent in the publication of the sham complaint and other defamatory statements of rape and drugging. Defendant similarly refuses to concede that her public relations firm, Sunshine Sachs, was her

¹ As this Court recognized in its August 31, 2018 decision denying Defendant’s motion to strike Plaintiffs’ Amended Bill of Particulars and granting Plaintiffs’ cross-motion to amend to file the TAC, the truth or falsity of Defendant’s accusations that Gottwald raped and drugged her in 2005 (vehemently denied by Gottwald) ***“is ultimately for a jury to decide.”*** Lepera Aff., Ex. 58, Doc. 1537, at p. 2 n. 5 (emphasis added). Similarly, as this Court noted, ***“a trier of fact could possibly conclude that the California complaint was a sham maliciously filed solely to defame plaintiffs as part of [Defendant’s] alleged campaign to destroy Gottwald as leverage to renegotiate her contracts.”*** *Id.* at p. 9 (emphasis added).

agent in publicizing her defamatory assertions. Accordingly, Plaintiffs seek summary judgment on these agency issues as a matter of undisputed fact and law.²

Third, Plaintiffs seek summary judgment on Defendant's sole remaining counterclaim, namely that she is entitled to be substituted for Plaintiff KMI in its contract with Kemosabe Records, for KMI's alleged failure to deliver her recordings to Kemosabe Records. Defendant knows that is false; KMI paid her for her recordings, and she performed and delivered her album, *albeit* late and after having breached her KMI contract. No one other than Defendant delayed delivery of her recordings, as the First Department made clear in rejecting her appeal of a decision denying her leave to file another counterclaim to get out of her contracts, based upon a demonstrably untrue claim of "impossibility of performance."

Lastly, Plaintiffs are moving for summary judgment on KMI's right to receive interest on certain untimely royalty payments made on Defendant's ancillary income, and on certain of Defendant's defenses that are without merit based on the undisputed record.

FACTUAL BACKGROUND³

I. Gottwald Discovers Defendant And Signs Her To An Exclusive Recording Deal

Gottwald p/k/a as "Dr. Luke" is a songwriter and producer of musical recordings, and the

² Plaintiffs understand that Defendant is actually seeking summary judgment that Mark Geragos and Sunshine Sachs are **not** her agents, as a matter of law, in publicizing her defamatory statements, which motion Plaintiffs will oppose and which they submit is baseless. Indeed, Plaintiffs' motion on these agency issues should be granted. Plaintiffs also understand that Defendant is moving on a number of issues that are rife with factual disputes, such as the so-called "litigation privilege," which motion Plaintiffs will demonstrate must be denied based on the record in this case.

³ The facts presented in this Factual Background section are provided for context and chronological background on the claims at issue on this motion; not all of them are undisputed or form the basis of this motion. The specific undisputed facts underlying this motion are set forth in the Argument section below; the evidence supporting the motion is specifically identified in the corresponding Undisputed Facts section of the accompanying Affirmation of Christine Lepera, sworn to October 18, 2018, and attached thereto.

principal and owner of Plaintiff KMI, which furnishes the services of certain individuals in the entertainment industry. *See* Lepera Aff., Ex. 55, at 5:14-15; 31:8-37:9.

In or about 2005, Gottwald heard a “demo” tape of an unknown and unsigned musical artist named Kesha Rose Sebert from Nashville, Tennessee, and expressed interest in working with her. *See id.*, at 40:4-48:4. Represented by separate and independent entertainment counsel, the parties entered into an exclusive recording agreement effective as of September 26, 2005 (the “KMI Agreement”). Lepera Aff., Ex. 2, Doc. 1540, ¶ 25; *see also* Lepera Aff., Ex. 47.

Under the terms of the KMI Agreement, Defendant agreed, among other things, that: (a) she would provide her exclusive recording services to KMI for a specified term, which at KMI’s election could be extended through the release of Defendant’s sixth album (which was later modified to her fifth album); (b) Gottwald would be engaged to provide production services for at least six recordings on each of Defendant’s albums; and (c) Gottwald would be provided with a specified percentage of the sales of each such recording he produced. *See* Lepera Aff., Ex. 47.

II. Defendant’s First Attempt To Terminate The KMI Agreement

Shortly following the entry of the KMI Agreement, Defendant became frustrated that Gottwald was not immediately devoting enough time to her recording career. Lepera Aff., Ex. 68. To try to “manage” Gottwald, she retained new representatives, including a manager, who in turn wanted to get her a richer recording agreement. *See id.*; Ex. 69. They thus sought to repudiate the KMI Agreement in late 2005, on several baseless grounds, which later included making vague and fictitious assertions that Gottwald had purportedly engaged in some improper conduct with Defendant. *See id.*, Ex. 68. Defendant’s representatives threatened to make this fictitious story public if Gottwald did not agree to terminate the KMI Agreement. *See id.*, Ex. 69. Gottwald refused to accede to extortion and give up his clear contractual rights. After negotiations leveraged by these threats did not succeed, Defendant and her representatives,

clearly recognizing that the story had no merit, did not file any claim, and a stalemate was reached.

Later, in or about 2008, Defendant fired her representatives, and asked Gottwald to forgive her for having made a mistake, and to work with her. *See* Lepera Aff., Ex. 5, at 244:25-245:17. With another new, sophisticated entertainment lawyer at the helm, Defendant disavowed her prior repudiation of the KMI Agreement, reaffirmed that it was valid and binding, and executed amendments thereto in 2008 and 2009. Lepera Aff., Ex. 2, Doc. 1540, ¶¶ 30, 35; *see also* Exs. 48-49. Defendant agreed to be bound by an agreement that KMI entered into in 2009 with the RCA/JIVE record label (“RCA”) to release and promote Defendant’s recordings under an Assent, Guaranty, and Entertainment Rights Agreement (the “Assent”). Lepera Aff., Ex. 2, Doc. 1540, ¶ 31; *see also* Ex. 38.⁴ Defendant also entered into a separate Co-Publishing and Exclusive Administration Agreement with Plaintiff Prescription Songs, Gottwald’s publishing company (the “Prescription Publishing Agreement”) in 2008. Lepera Aff., Ex. 2, Doc. 1540, ¶ 32; Ex. 38.

Thus, *after* the date of the alleged drugging and rape, Defendant signed *four* new agreements reaffirming and extending her 2005 contractual relationship with Gottwald and his companies, each time represented by an experienced and sophisticated entertainment lawyer. Lepera Aff., Ex. 2, Doc. 1540, ¶ 35.

III. Defendant Enjoys Enormous Success Working With Gottwald

Gottwald and KMI produced and promoted Defendant’s debut album for KMI entitled *Animal* and follow-up EP entitled *Cannibal*, both of which were released in 2010. Lepera Aff., Ex. 2, Doc. 1540, ¶ 36. Both of these works sold millions of copies worldwide, and spawned

⁴ RCA’s rights under the RCA Agreement were subsequently assigned to Kemosabe Records, which is a joint venture co-owned by Sony Music Entertainment and an entity owned by Gottwald. Lepera Aff., Ex. 70, ¶ 5.

numerous Number 1 singles, including “Tik Tok” and “We R Who We R.” Lepera Aff., Ex. 42, at p. 9. Gottwald provided Defendant’s family with opportunities, as well. *See, e.g.*, Lepera Aff., Ex. 71. Defendant and her mother Pebe Sebert (“Pebe”) both repeatedly expressed their gratitude and admiration for all that Gottwald had done for their careers and families. *See, e.g.*, Lepera Aff., Exs. 72-78. During this time, Gottwald and Defendant maintained a close and friendly relationship, with mutual friends and with frequent, regular interactions. *See* Lepera Aff., Ex. 79, at 124:7-125:6; Ex. 80, at 16:7-17:1, 19:4-24, 20:5-12, 23:1-13, 68:12-69:10, 71:4-7, 85:13-86:7.

IV. After Her Rise To Stardom, Defendant Begins To Make Demands On Gottwald And Breaches Her Contracts

The relationship between Defendant and Gottwald began to deteriorate in or about late 2011 – early 2012, when Defendant (for the second time) began an aggressive campaign to obtain more favorable financial terms and change her contracts.⁵ Lepera Aff., Ex. 67, at 154:9-155:8. Defendant went so far as to refuse to show up at scheduled recording sessions (costing the labels substantial expense). Lepera Aff., Ex. 5, at 322:33-323:6, 327:23-329:6. Defendant’s own management noted her erratic and at times abusive behavior, commenting on how she treated some of the staff professionals with whom she worked. Lepera Aff., Exs. 82-84.

During the recording of Defendant’s second album in 2012, creative disputes also began to arise between Defendant and Gottwald. Lepera Aff., Ex. 80, at 65:5-66:18; Ex. 85, at 173:14-176:9. However, as music industry professionals who witnessed the relationship between Gottwald and Sebert confirmed under oath in this case, nothing out of the ordinary occurred. *Id.*, at 88:13-18, 84:10-18, 85:18-86:1. Defendant, however, was intent on getting better financial

⁵ Defendant had hired another sophisticated entertainment lawyer, who was attempting to obtain these amendments. Lepera Aff., Ex. 67 at 150:4-12, 154:9-155:8.

and creative terms, and the pressure for same mounted. Defendant's management, Vector Management ("Vector") also was intent on obtaining better contract terms for Defendant as well, and made their animus towards Gottwald known. In 2012, Defendant's representatives were planning their "Jihad" against Gottwald and their desire for a "public execution." Lepera Aff., Ex. 86. One of Defendant's personal managers stated his intention to "ruin" Gottwald after he finished Defendant's album (an album Vector believed had "huge hits on it"). Lepera Aff., Ex. 87. He also revealed their plot in writing: *"Lets [sic] battle this guy in the press. Take down his business."* Lepera Aff., Ex. 88.

At this same time, when Defendant's managers were fired up about getting Defendant a new contract and expressing their animus towards Gottwald, they also were fully aware that Defendant already had testified under oath that Gottwald had never drugged her or engaged in inappropriate sexual behavior with her. In 2011, both Defendant and her mother, Pebe, were deposed in a lawsuit seeking management commissions brought by Defendant's manager from 2005 (who had since been terminated by Defendant). Lepera Aff., Ex. 1, Doc. 1539, Exs. E-F. During the depositions, Defendant and her mother testified under the penalty of perjury. Specifically, Defendant swore that she never had an intimate relationship with Gottwald, that he had never given her a "date rape drug," and that he had never made a sexual advance toward her – let alone raped her:

[Q]: Do you know what a roofie is?

A. Yes.

Q. What is that?

A. It's a drug.

Q. Which does what?

A. It's like a date rape drug.

* * *

Q. Did Dr. Luke ever give you a roofie?

A. No.

* * *

Q. Okay, when – did you ever have an intimate relationship with Gottwald?

[Gottwald's counsel]: Objection as to form.

A. No.

* * *

Q. Did your mother complain [to ex-manager] about Dr. Luke having made sexual advances to you?

* * *

A. I don't know what my mother told to [ex-manager]. I know that I've – Dr. Luke never made sexual advances at me, so –

Lepera Aff., Ex. 1, Doc. 1539, Ex. E.

Pebe Sebert similarly testified neither her daughter nor anyone else ever told her that Gottwald had given Defendant a date rape drug and that she did not believe that Gottwald and Sebert had any sexual relationship:

Q. ... Before that first meeting with – with [DAS], had anyone told you that Gottwald had slipped Kesha a date rape drug?

A. No.

Q. Did anyone ever tell you that at any time?

A. No.

* * *

Q. Are you aware of whether he had had any kind of sexual relationship with your daughter prior to the time you met with [ex-manager] at the Chateau Marmont?

A. I don't believe there was, no.

Lepera Aff., Ex. 1, Doc. 1539, Ex. F.

Defendant's managers at Vector attended Defendant's deposition. Lepera Aff., Ex. 1, Doc. 1539, Ex. E, at p. 2. When Defendant and her representatives were unable to convince Gottwald to enter into contractual amendments in 2012, Defendant and her management needed to find another way to ratchet up the heat on Gottwald.

V. When Defendant's Contract Demands Were Not Met Through Negotiations, Defendant And Her Representatives Begin A Campaign of Defamation And Extortion To Pressure Gottwald To Capitulate

Commencing in 2013, Defendant also refused to provide services under, and otherwise breached, the KMI Agreement and the Prescription Publishing Agreement.⁶ *See, e.g.*, Lepera Aff., Ex. 43, at 441:20-442:2. For approximately four years, Defendant failed and refused to account for or pay KMI any ancillary royalties whatsoever, despite being obligated to do so under the KMI Agreement. Lepera Aff., Exs. 52. Moreover, Defendant refused to deliver any compositions for years – even though she was regularly writing new songs – and thereby breached the Prescription Publishing Agreement by failing to deliver any compositions to Prescription Songs within a commercially reasonable period of time. *See, e.g.*, Lepera Aff., Ex. 43, at 441:20-442:2.

Obviously cognizant that Defendant's 2005 attempt to get better contract terms using vague and false assertions of abuse had not worked, Defendant, her new representatives and public relations persons knew they had to go much further, by threatening to publicly release a lurid and false claim of drugging and rape by Gottwald in order to achieve what they wanted. Further, given Defendant's recently-acquired star power and clout, she and her team knew that she would have leverage with the threat to go public. She hired Mark Geragos, and yet another

⁶ As set forth in Argument section IV.B., Defendant did not resume providing recording services under the KMI Agreement until 2016.

new entertainment lawyer, Kenneth Meiselas. Lepera Aff., Ex. 29 at 32:3-18, 86:2-8.

With Defendant's new team in place, her mother threatened to "start making public" (false) accusations against Gottwald unless he "releases Kesha from all legal contracts, and gives me back all my publishing" Lepera Aff., Ex. 89. Pebe further threatened that she was "sending all of this to the blogger who has started the whole 'Free Kesha' thing" – Michael Eisele – who would become a major player in Defendant's defamatory campaign against Gottwald. Lepera Aff., Ex. 91. In December 2013, Pebe sent multiple emails, including to individuals with whom Plaintiffs did business, stating that "Dr. Luke abused Kesha, both physically and mentally," and threatening to further disseminate her accusations unless Plaintiffs capitulated to Defendant's demands. *See, e.g.*, Lepera Aff., Ex. 30. In January 2014, with the knowledge and intention that they would be widely circulated, Defendant sent letters to certain individuals spreading her false factual assertions regarding Gottwald. Lepera Aff., Ex. 67, at 87:17-88:2; Ex. 92. A Twitter account operated by Mr. Eisele published many of these letters. Lepera Aff., Ex. 93; Ex. 94, at 34:7-16.

In the summer of 2014, Defendant's new entertainment counsel Mr. Meiselas (who was working with Mr. Geragos) held a meeting in New York City with the general counsel of Sony, a company with whom Gottwald was doing substantial business. Lepera Aff., Ex. 29, at 148:7-149:6. Defendant's attorney showed the general counsel a purported "draft complaint" against Gottwald which contained false and scurrilous accusations against Gottwald of, among other things, having raped Defendant and given her drugs against her will. Lepera Aff., Ex. 96, at 63:19-65:17. In yet another blatant act of extortion, Defendant's attorney informed the general counsel that if Gottwald did not agree to let Defendant out of her recording agreement, they would file the "draft complaint," thereby destroying Gottwald's reputation. *Id.*, at 67:12-24.

Obviously cognizant of the unlawful nature of this conduct, Defendant's attorneys refused to let the general counsel retain a copy of the "draft complaint," and refused to allow Gottwald or his representatives to even look at it. *Id.*, at 68:6-10.

VI. Defendant Embarks Upon A Calculated "Press Plan" Of Negative Publicity To Ruin and Pressure Gottwald, Defendant Files The Sham California Complaint (Now Voluntarily Dismissed)

Unsatisfied with the pace of their efforts to force Gottwald to give up his contractual rights, Defendant followed through with her attorneys' threat, and filed the defamatory sham complaint in California Superior Court (the "Sham Complaint") on October 14, 2014 (the "California Action"). Lepera Aff., Ex. 56. In addition to numerous other baseless allegations⁷, the Sham Complaint repeated Defendant's false claim that Gottwald had drugged and raped her. *Id.*, ¶ 23.

The Sham Complaint was filed to ensure that the lurid rape and drugging allegations would be widely disseminated by the press, to gain the "maximum level of negative publicity" against Gottwald. Lepera Aff., Ex. 17. The expressly stated goal of a written "Press Plan" designed by Defendant's management, attorneys, and public relations agents was to maximize public pressure and negative publicity against Gottwald and his business partners by disseminating these false allegations, just as Defendant's management had stated they would in their earlier emails. *Id.*

An integral part of the Press Plan, Sunshine Sachs delivered a copy of the Sham Complaint to the hugely popular gossip website TMZ.com well prior to its filing, and coordinated *in advance* with TMZ to disseminate a statement provided by Mr. Geragos repeating

⁷ Obviously designed to embarrass and tarnish Gottwald, the Sham Complaint also contained wholly irrelevant and false allegations regarding Gottwald's private life – which of course had nothing to do with Defendant – including the horrific allegation that Gottwald forced his wife to have an abortion. Lepera Aff., Ex. 56, ¶ 20. Not only is this entirely false, but it was obviously included in the Sham Complaint by Defendant with the sole intention of harming Gottwald.

Defendant's false and defamatory allegations against Plaintiffs. Lepera Aff., Exs. 18, 97-98.

Moments after the Sham Complaint was filed, and at Defendant's representatives' direction, TMZ broke the story, repeating Defendant's defamatory statements, including through its publication of Geragos' defamatory press statement. Lepera Aff., Ex. 57. Following TMZ's report, countless media outlets almost immediately picked up the story and published similar articles repeating Defendant's false assertions. This result was intended by Defendant's Press Plan, which expressly planned to have "[o]ther tabloid and celebrity outlets, as well as mainstream media, follow TMZ closely for their breaking news so the story will quickly spread from there and onto other online outlets." Lepera Aff., Ex. 17. As part of the Press Plan, Defendant and her representatives also distributed the Sham Complaint, portions thereof, and Geragos' press statement to numerous media outlets, who reported on Defendant's false allegations that she had been drugged and raped by Gottwald. Lepera Aff., Ex. 99.

The Sham Complaint contains multiple false and defamatory allegations. The evidence establishing the falsity of Defendant's malicious claim includes:

- At a deposition in another lawsuit in 2011, Defendant testified under oath that she never had an intimate relationship with Gottwald, that he had never given her a "date rape drug," and that he had never made a sexual advance toward her – let alone raped her. Lepera Aff., Ex. 1, Doc. 1539, Ex. E.
- Defendant's mother, Pebe, similarly testified under oath that neither her daughter nor anyone else ever told her that Gottwald had given Defendant a date rape drug and that she did not believe that Gottwald and Sebert had a sexual relationship. Lepera Aff., Ex. 1, Doc. 1539, Ex. F.
- Defendant alleged that on the night of the alleged rape, October 5, 2005, she was given "sober pills" by Gottwald that she "later learned . . . were actually a form of gamma-hydroxybutyrate (GHB)." Lepera Aff., Ex. 56, ¶ 23. However, Mr. Geragos testified that this classification of the "sober pills" as GHB was merely his opinion, and Plaintiffs' expert testified that there was no way that Defendant could have determined that the alleged "sober pill" was GHB. Lepera Aff., Ex. 8, at 498:17-501:23; Ex. 115, at p. 3-7; *see also* Ex. 116.

- Defendant alleged Gottwald “rape[d]” Defendant “while she was unconscious.” Lepera Aff., Ex. 56, ¶ 23. However, Defendant previously swore under oath that this never happened, she has no memory of Gottwald being in the hotel room that night, and she told her therapist only days later that she was “doing well.” Lepera Aff., Ex. 67, at 322:5-11; Ex. 118, 71:2-25; Ex. 119. And Gottwald, the only person with any memory of what happened in the hotel room, testified unequivocally that he did not sexually assault Defendant or engage in any other improper conduct with her; rather, he slept on the couch on the night in question. Lepera Aff., Ex. 5, at 190:6-191:17, 201:1-202:25. Plaintiffs’ sexual assault expert also opined that Defendant’s accusations were more consistent with a false accusation of sexual assault. *See* Lepera Aff., Ex. 120.
- Defendant alleged she “immediately called her mother and made a ‘fresh complaint’” about the night’s events. Lepera Aff., Ex. 56, ¶ 23; Ex. 43, at 382:18-383:4. But Pebe both denied this unequivocally under oath in a prior action, and in this case, testified that Defendant did not tell her about the purported drugging until years later. Lepera Aff., Ex. 1, Doc. 1539, Ex. F; Ex. 90 Pebe Tr., at 92:20-22, 178:7-9.
- Pebe also admitted during her deposition in this action that she and Defendant co-wrote a song called “Paris Hilton’s Closet,” which is a zany, humorous novelty pop song about the very night in which Defendant now falsely claims she was raped. Lepera Aff., Ex. 90, at 131-135; Ex. 121. It defies belief that Defendant and her mother would have written such a song about the night she was purportedly raped.
- Similarly, Defendant later joked in an interview that she threw up in Paris Hilton’s closet as a result of mixing different various types of alcohol and eating bad sushi. Lepera Aff., Ex. 122.
- Defendant alleged Gottwald went on a walk on the beach with her in advance of her 2011 deposition during which he “threatened [Defendant] and her family’s physical safety” if she ever mentioned the purported rape to anyone. Lepera Aff., Ex. 56, ¶ 24. However, Defendant’s admissions at her deposition in this action establish that Gottwald did not threaten anyone’s safety and that Defendant was under no duress when she testified at her 2011 deposition. Lepera Aff., Ex. 67, at 46:13-58:14.
- Defendant alleged that she thereafter “endured years of unrelenting abuse at the hands of [Gottwald].” Lepera Aff., Ex. 56, ¶ 25. The testimony of Allan Grigg and Clint Gibbs, both of whom spent considerable time with Gottwald and Defendant during this period, directly contradicts this. *See* Lepera Aff., Exs. 79-81.

After the Sham Complaint was filed, Defendant and her representatives embarked on a

public smear campaign against Plaintiffs, repeating Defendant's defamatory allegation that Gottwald had drugged and raped her, in many public forums.

In addition to their other press activities, Defendant and her representatives closely (and secretly) coordinated with social media accounts, including those run by Michael Eisele, the organizer of the so-called "Free Kesha" campaign, to further spread Defendant's defamatory statements that Gottwald drugged and raped her on both social media and in the press. *See, e.g.*, Lepera Aff., Exs. 100-104. Defendant and her representatives helped Mr. Eisele plan public demonstrations against Plaintiffs, including outside of the New York Supreme Courthouse on the hearing date of the preliminary injunction motion, and outside of the offices of Sony Music. Defendant and her representatives encouraged, and assisted with the creation of, bogus Internet "petitions" by promoters of the "Free Kesha" campaign, including Mr. Eisele, to, *inter alia*, pressure Sony to terminate its business with Plaintiffs. *See, e.g.*, Lepera Aff., Exs. 100-108. Multiple of these "petitions" were claimed to be the independent work of a 46-year old woman named Rebecca Pimmel. Defendant and her team knew that Rebecca Pimmel does not exist. These "petitions" were **actually** created by a coordinated effort between the Seberts and Mr. Eisele. Lepera Aff., Ex. 94, at 118:25-121:6.

After this Court properly denied Defendant's motion for a preliminary injunction on February 19, 2016, Defendant and her representatives doubled down on their coordinated effort to "blacklist" Plaintiffs from the music industry, using the press and social media to further disseminate Defendant's false claim that Gottwald had drugged and raped her. This campaign included encouraging the public and famous artists and celebrities to publicly condemn Gottwald. *See, e.g.*, Lepera Aff., Exs. 109-113. Artists who did not steer clear of him were tainted by association and attacked publicly. *See, e.g.*, Lepera Aff., Ex. 114. Defendant and her

representatives recognized that the more widely these accusations were circulated, the more tarnished Gottwald's name would become, and his business, as planned, would be destroyed.

VII. Defendant Never Had Any Intention To Ever Have To Prove Her Rape Claim

The sham nature of Defendant's complaint and related filings in both the California Action and this action is revealed by Defendant's own conduct, as reflected by the litigation history, the evidence obtained by Plaintiffs in discovery, and Defendant's own concessions. Defendant's court filings were means to an end goal, which was not redress through the litigation process. As this Court noted on numerous occasions, Defendant tried this case in the press, not in the courts. She used social media, boycotts, and the press in general to decimate Gottwald with her false assertions, but she in no way ever intended prove them to a trier of fact. She knew she could not, as the claim of drugging and rape is false, as she swore under oath in 2011. After her California Action was stayed, Defendant filed Sham Counterclaims in New York, asserting torts against Gottwald which were dismissed with prejudice by this Court on April 6, 2016. Lepera Aff., Ex. 34, Doc. 504. Following that dismissal, Defendant filed a Notice of Appeal of this Court's April 6, 2016 Order. Lepera Aff., Ex. 35, Doc. 541. In August 2016, Defendant then **voluntarily** dismissed the California Action (after falsely informing the California court she would be seeking to amend). Lepera Aff., Ex. 123. Her attorneys issued a press release at that time saying that "Kesha had dismissed her California action without prejudice while she pursues her appeal and other claims in the New York courts." Lepera Aff., Ex. 124. Despite this public proclamation, on December 22, 2017, Defendant then **voluntarily withdrew** her appeal of this Court's April 6, 2016 Order that had dismissed with prejudice all of her tort and statutory Counterclaims premised upon her false allegations that Gottwald had drugged and raped her. Lepera Aff., Ex. 37, Doc. 1154. Defendant's tactical timing of her voluntary dismissals and her misleading press release were designed to falsely suggest Defendant would still pursue a rape-

related claim. This speaks volumes about Defendant's effort to camouflage her abandonment of her rape claims *in both courts*, and further evidences the sham nature of her filings.

VIII. Defendant Falsely Asserts That Gottwald Raped Another Recording Artist

On February 26, 2016—one week after losing her motion for preliminary injunction—Defendant initiated a text message conversation with Stefani Germanotta p/k/a “Lady Gaga,” falsely stating that she and another female recording artist, Katheryn Hudson p/k/a Katy Perry, had both been raped by the same man (Gottwald). Lepera Aff., Ex. 3. Defendant's continuing efforts to brand Gottwald as a rapist to persons of great significance in the music business were intentional and successful. After this text message conversation, Lady Gaga spread negative messages about Gottwald in the press, having no personal knowledge of Defendant's assertions and having essentially no prior personal dealings with Gottwald. Lepera Aff., Ex. 125. Lady Gaga also went so far as to suggest in a radio interview that she had secret damaging information regarding Gottwald. Lepera Aff., Ex. 126. Defendant knows full well that Gottwald did *not* rape the other recording artist, but refuses to acknowledge same, and has gone so far as to issue a press release still falsely suggesting this rape actually occurred. Lepera Aff., Ex. 4.

APPLICABLE LEGAL STANDARDS

CPLR 3212 provides that a motion for summary shall be granted where “upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR 3212(b); *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980) (describing the standard for a motion for summary judgment). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (citations omitted). “Once this showing has been made, however, the burden

shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Id.*; *Zuckerman*, 49 N.Y.2d at 562. “To require a trial, such fact issue must be genuine, *bona fide* and substantial.” *Leumi Fin. Corp. v. Richter*, 24 A.D.2d 855, 855 (1st Dep’t 1965) (citations omitted), *aff’d* 17 N.Y.2d 166 (1966). As set forth below, Plaintiffs are entitled to summary judgment on a number of undisputed issues in this action.

ARGUMENT

I. Plaintiffs Are Entitled To Partial Summary Judgment With Respect To Their Second Cause Of Action For Defamation

Plaintiffs’ Second Cause of Action asserts a claim for defamation against Defendant based on her dissemination of a text message to Lady Gaga on February 26, 2016, which falsely stated that Gottwald raped Katy Perry (the “Defamatory Text Message”). *See Lepera Aff.*, Ex. 1, TAC, ¶¶ 99-110, 118-124. In the Defamatory Text Message, Defendant stated to Lady Gaga that “she [Katy Perry] was raped by the same man [Gottwald].” *Lepera Aff.*, Ex. 3, at p. 23. Even though Ms. Hudson and Gottwald confirmed under oath the accusation is false, Defendant refuses to concede that Gottwald did *not* rape Ms. Hudson, and has gone so far as to issue a press release falsely suggesting this rape actually occurred. *Lepera Aff.*, Ex. 4.

The elements of a defamation claim are (i) a statement of fact, (ii) regarding the plaintiff, (iii) that is false, (iv) published without privilege or authorization to a third party, (v) constituting fault as judged by, at a minimum, a negligence standard, and (vi) it must either cause special harm or constitute defamation *per se*. *See Epifani v. Johnson*, 65 A.D.3d 224, 233-34 (2d Dep’t 2009). Based on the undisputed factual record, Plaintiffs are entitled to partial summary judgment as to the first, second, third and sixth elements of this claim with respect to

Defendant's assertion regarding Ms. Hudson.⁸

With respect to the first element, there is no question that Defendant published a fact, *i.e.*, that Gottwald raped Katy Perry. In determining whether a communication is a statement of fact, “[t]he dispositive inquiry, under ... New York law, is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff.” *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 (1993) (citations and quotation marks omitted). Here, the context of the other text messages between Defendant and Lady Gaga makes clear that the Defamatory Text Message conveyed a fact with a precise meaning capable of being proven as true or false -- *i.e.*, that Gottwald raped Katy Perry. The Defamatory Text Message would be readily understood by the average reader to convey this fact, and Lady Gaga understood it to convey this fact. *See* Lepera Aff., Ex. 3, at pp. 25-38; *see also* *Gross*, 82 N.Y.2d at 153.

Defendant also admitted in her Answer to the TAC that the “man” mentioned in the Defamatory Text Message was Gottwald, thereby conceding the second element of this claim. *Lepera*, Aff., Ex. 2, Doc. 1540, ¶ 102. The surrounding context of the Defamatory Text Message also confirms that Lady Gaga had the same understanding. *See, e.g.*, *Lepera* Aff., Ex. 3, at pp. 1-3 (Lady Gaga to Defendant: “What is happening with the lawyers ... Is Luke budging? ... What is Sony saying”); *DeBlasio v. N. Shore Univ. Hosp.*, 213 A.D.2d 584, 584 (2d Dep’t 1995) (statement actionable where the person defamed is not named, as long as “persons reading it will, in light of the surrounding circumstances, be able to understand that it refers to the person complaining.”) (citation and quotation marks omitted).

With respect to the third element, again, both Katy Perry and Gottwald testified

⁸ The Defamatory Text Message also contains a second defamatory assertion of fact: that Gottwald raped Defendant. Plaintiffs do not seek summary judgment with respect to that second assertion, but instead they will establish Defendant's liability for having made it at trial.

unequivocally that the statement is false. Lepera Aff., Ex. 5, at 368:13-19; Ex. 6, at 11:6-22.

Finally, with respect to the sixth element, there is no dispute that the Defamatory Text Message accused Gottwald of the serious crime of rape, and thereby constitutes defamation *per se*. *Epifani*, 65 A.D.3d at 234-35.

Plaintiffs are entitled to partial summary judgment on the first, second, third, and sixth elements of the Second Cause of Action as a matter of law and undisputed fact.

II. The Statements Made By Mark Geragos And Sunshine Sachs That Gottwald Raped And Drugged Defendant Were Made In Their Capacity As Defendant's Agents

Plaintiffs' First Cause of Action for Defamation seeks relief in connection with (*inter alia*) Defendant's repeated assertions in the press that Gottwald drugged and raped her, statements which were made by Defendant personally and by and through her agents, including Mark Geragos and Sunshine Sachs. Defendant refuses to concede these agency issues, which Plaintiffs submit is wholly unreasonable and patently absurd.

As a preliminary matter, and as this Court is aware, Defendant tried to conceal from Plaintiffs her "press plan" documents, and other documents reflecting the press activities of Geragos and Sunshine Sachs in disseminating Defendant's false accusations that Gottwald drugged and raped Defendant. Notably, Defendant initially claimed these documents were insulated from discovery under the attorney-client privilege, because Geragos and Sunshine Sachs were *agents* of Defendant. *See* Doc. 1094 at p. 6 (arguing that "*agency* exception [to privilege waiver rule] applies specifically" to Sunshine Sachs in their role as Defendant's "public relations consultants and *agents*.")) (emphasis added). Now, after the First Department held that

their press activities are not privileged⁹, Defendant has taken the *exact opposite* position, and untenably contends that Sunshine Sachs and Geragos were not her agents in carrying out *these very same press activities*. This Court should reject this gamesmanship, and enter summary judgment on this issue, finding that Geragos and Sunshine Sachs were acting as Defendant's agents in publishing the assertions set forth in Paragraphs 59-61, 64-65, 68-75 of the TAC based upon the doctrines of actual authority, apparent agency, and ratification as a matter of law.¹⁰

A. Geragos And Sunshine Sachs Had Actual Authority To Publish Defendant's Defamatory Statements

A principal is liable for defamatory statements made by his or her agents when acting within the scope of his or her authority or at the principal's direction. *Stevenson v. Cramer*, 151 A.D.3d 1932, 1934 (4th Dep't 2017). A principal-agent relationship is established by evidence of the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act even where the agent is acting as a volunteer." *O'Connell v. Macy's Corp. Servs., Inc.*, 154 A.D.3d 628, 629 (1st Dep't 2017) (citation omitted). The agent's conduct need only be "generally foreseeable" by the principal for liability to be imputed to the principal. *Murray v. Watervliet City Sch. Dist.*, 130 A.D.2d 830, 832 (3d Dep't 1987). Therefore, provided that the agent's conduct was foreseeable, "[a]gency liability exists even though the principal does not specifically ratify, participate in, or know of such 'misconduct', or *even if he forbade or disapproved of an act.*" *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 147 (1st Dep't 1993) (citation omitted) (emphasis added). Based upon the

⁹ The First Department recognized that Sunshine Sachs were indeed Defendant's "press *agents*," but nonetheless held that these communications were not privileged because they concerned public relations strategy, as opposed to legal strategy. *Lepera Aff.*, Ex. 26, at p. 84 (emphasis added).

¹⁰ Plaintiffs do not seek summary judgment as to the issue of Michael Eisele's agency. Rather, Plaintiffs will establish at trial that Mr. Eisele was Defendant's agent in making the defamatory assertions set forth in Paragraphs 78-84, 90-91 of the TAC.

undisputed factual record, the press activities of both Geragos and Sunshine Sachs unquestionably satisfy this standard for agency as a matter of law.

There is no dispute that Defendant gave her consent for Geragos to act on her behalf, and file the Sham Complaint. Geragos' press activities associated therewith both before and after filing the Sham Complaint were, of course, encouraged and promoted by Defendant and her management. The undisputed facts in this case make clear that Defendant can in no way claim that these activities were not, at an absolute minimum, generally foreseeable. The operative engagement agreement that governed Geragos' representation of Defendant in connection with her claims against Gottwald expressly anticipated Geragos making public statements on Defendant's behalf regarding her allegations of sexual assault against Gottwald. *Lepera Aff.*, Ex. 7. There also is no dispute that Geragos was subject to Defendant's control, both pursuant to the ethical rules which govern attorney conduct, and pursuant to the specific terms of his engagement agreement. *See, e.g.*, California Rule of Professional Conduct 3-500; New York Rule of Professional Conduct 1.4(a).

There similarly is no dispute that Geragos accorded Sunshine Sachs with actual authority to serve as a subagent of Defendant in issuing press statements on Defendant's behalf.¹¹ First, prior to the press activities at issue, Geragos entered into a signed engagement agreement for

¹¹ The undisputed facts discussed herein demonstrate that in addition to providing Geragos and Sunshine with actual authority to make public statements on her behalf, Defendant also cloaked them both with apparent authority. *See American Soc. of Mech. Eng'rs. v. Hydrolevel Corp.*, 456 U.S. 556, 566, 102 S.Ct. 1935, 1942–1943 (1982); *Hallock v. State*, 64 N.Y.2d 224, 231 (1984). “[A]pparent authority may arise without any contact between the principal and the third party, particularly where the principal has voluntarily placed the agent ‘in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular businesses is justified in assuming that such agent has authority to perform a particular act.’” *Galasso, Langione, & Botter, LLP v. Galasso*, 53 Misc. 3d 1202(A) (N.Y. Sup. Ct. 2016) (citations omitted). Moreover, “‘appointment of a person to a position with generally recognized duties may create apparent authority.’” *Id.* (citation omitted).

Sunshine Sachs to provide public relations services for “*the exclusive benefit of Kesha Rose Sebert.*” Lepera Aff., Ex. 10 (emphasis added). Geragos and Vector then worked with Sunshine Sachs to devise the “Press Plan” to maximize the harm to Plaintiffs through press-related activities publicizing Defendant’s sexual assault accusations. Lepera Aff., Ex. 11, at 230:15-231:7; 294:21-295:1. Thereafter, Geragos and Vector¹² coordinated with Sunshine Sachs in connection with its press endeavors on behalf of Defendant. Lepera Aff., Ex. 11, at 122:11-18; 209:5-10; 230:8-231:7; 294:2-295:8; Ex. 13, ¶ 8, 21-22; Ex. 14, ¶ 6-7; Ex. 15, ¶ 6; Ex. 16; Ex. 17; Ex. 19; Ex. 20. There also is no dispute that Sunshine Sachs was subject to the control of Geragos, who in turn was subject to Defendant’s control. *See, e.g.*, Lepera Aff., Ex. 14, ¶ 17 (“I have deferred to Kesha’s attorneys”); ¶ 22 (“... Kesha’s counsel hav[e] final decision-making authority over the statements’ content”). Finally, Sunshine Sachs’s press activities were, at absolute minimum, generally foreseeable by Defendant. It is undisputed that Defendant met with Sunshine Sachs on multiple occasions to prepare herself for *press* pertaining to her sexual assault claims against Gottwald. *See* Lepera Aff., Ex. 16; Ex. 11, at 172:10-173:17; Ex. 14, ¶ 20. Moreover, Vector, Defendant’s fully designated agent for dealing with Sunshine Sachs on her behalf, was fully aware of all these matters and approved them. *See* discussion *supra*.

¹² It also is undisputed that Vector was authorized by Defendant to coordinate press activities on her behalf. Vector’s engagement agreement with Defendant broadly authorizes Vector to “to represent [Defendant] and to act as [Defendant’s] advisor in *all matters* relating to [Defendant’s] career” Lepera Aff., Ex. 21 (emphasis added). Vector also previously informed this Court that it was “engaged to act on Kesha’s behalf in *all aspects* of her career other than seeking out work on the artist’s behalf.” Lepera Aff., Ex. 23, Doc. 163, at p. 1 (emphasis added). Vector also explained its role was to “*serve[] as a liaison between [Defendant] and other personal representatives*, arranging their interactions with, and transactions on behalf of, the artist.” Lepera Aff., Ex. 24, Doc. 48 at p. 7 (emphasis added). Further, during the hearing on Plaintiffs’ second motion to compel against Sunshine Sachs, Defendant’s counsel asserted that, in communicating with Sunshine Sachs, Vector was acting on behalf of Defendant as her *legal agent*. Lepera Aff., Ex. 25, Doc. 1136 at pp. 30-31.

B. Defendant Ratified The Statements Of Geragos And Sunshine Sachs

While actual authority is clear, it also is clear that Defendant ratified the statements of Geragos and Sunshine Sachs. A principal can also be liable for the acts of its agent under the principle of ratification. *See, e.g., Meisel v. Grunberg*, 651 F. Supp. 2d 98, 110 (S.D.N.Y. 2009); *see generally* Rest. 3d Agency, § 4.03 (3rd 2006). Ratification can also be inferred from a failure to repudiate or dissent, so long as the principal has knowledge of the facts. *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238, 246 (2002); *Clark v. Bristol-Myers Squibb and Co.*, 306 A.D.2d 82, 85 (1st Dep't 2003).

Here, Defendant effected several separate ratifications of the press statements of Geragos and Sunshine Sachs. First, it cannot be disputed that Vector – whom Defendant invested with broad-reaching authority to “serve[] as a liaison between [Defendant] and other personal representatives” – had full knowledge of, and in fact endorsed, the defamatory public statements of Geragos and Sunshine Sachs. *See* discussion *supra*. Second, Defendant never made any public repudiation or disavowal of any such statement. Third, any assertion that she did not fully promote, support, endorse and encourage these statements is entirely incredulous. In any event, there is no “evidence” that Defendant could offer that could defeat this prong of the motion. Defendant reaped the benefits of the press campaign her representatives waged on her behalf and her baseless effort to distance herself from them should not be countenanced. In that regard, Defendant vociferously asserted to this Court, and to the First Department, that they were indeed her agents, and that their actions were performed on her behalf. *See, e.g., Lepera Aff.*, Ex. 27, Doc. 1094 at p. 6; Ex. 25, at 35:14-15; Ex. 28, at p. 12-13.

III. It Is Undisputed That Pebe Sebert Was Acting As Defendant's Agent In Publishing Certain Statements Alleged In The TAC

Similarly, it cannot be disputed that Pebe was acting on behalf of Defendant as her agent

in publishing the Defamatory Pebe Letter set forth in Paragraph 54 of the TAC. During the deposition of Defendant's attorney Kenneth Meiselas on April 26, 2017, an attorney who was appearing at the deposition as counsel for both Defendant and Pebe instructed Mr. Meiselas to refrain from answering questioning regarding his communications with Pebe about the Defamatory Pebe Letter, on the basis of the attorney-client privilege. In justifying this objection on the record, Defendant's counsel expressly confirmed that "Pebe Sebert was an agent of Kesha Sebert in sending" the Defamatory Pebe Letter. Lepera Aff., Ex. 29, at 82:14-83:13; Ex. 30.

Based on this representation by Defendant's counsel, Plaintiffs are entitled to judgment as a matter of law that this email was sent by Pebe in her capacity as Defendant's agent. By asserting that Pebe was Defendant's agent in publishing this letter and preventing Plaintiffs from obtaining testimony regarding this document on the basis of Pebe's alleged agency, Defendant is now estopped from taking a contrary position. *See AIG Trading Corp. v. Valero Gas Mktg., L.P.*, 254 A.D.2d 117, 118 (1st Dep't 1998). In addition, by confirming Pebe's role as Defendant's agent in transmitting this document, Defendant has ratified Pebe's agency. *See* discussion of ratification *supra*.

IV. Plaintiffs Are Entitled To Summary Judgment Dismissing Defendant's First Amended Counterclaim For Declaratory Relief

Defendant's sole remaining Counterclaim in this action seeks a declaratory judgment that: (1) the KMI Agreement has been terminated; and (2) pursuant to the terms of the Assent which is annexed to the RCA Agreement, Defendant "has stepped into the shoes of" KMI, *i.e.*, that Defendant has replaced KMI as a contracting party to the RCA Agreement. Lepera Aff., Ex. 33, Doc. 336, ¶¶ 65-73. Because Defendant is not entitled to either declaration, the First Cause of Action in her First Amended Counterclaims should be dismissed as a matter of summary judgment.

A. Defendant's "Election of Remedies" Legal Argument Is Meritless

Defendant's request for termination of the KMI Agreement in her First Cause of Action is premised upon her baseless legal argument that by "elect[ing] to sue Ms. Sebert for [the remedy of] damages [for breach of the KMI Agreement] rather than [seeking the remedy of] specific performance," the KMI Agreement was purportedly terminated automatically. *Lepera Aff.*, Ex. 33, Doc. 336, ¶ 72. This argument has no merit whatsoever, for the reasons stated by Justice Kornreich in her thorough decision in this action dated April 6, 2016. In that decision, Justice Kornreich properly dismissed Defendant's Eighth Cause of Action in her Counterclaims, which also was premised on this same baseless "election of remedies" theory. *See Lepera Aff.*, Ex. 34, Doc. 504 at p. 23-25. Pointedly, Defendant withdrew her appeal of Justice Kornreich's order of dismissal of this Eighth Cause of Action prior to perfecting the appeal. *Lepera Aff.*, Ex. 35, Doc. 541; Ex. 36, Doc. 543; Ex. 37, Doc. 1154.

B. Defendant Has Not Been Substituted For KMI Under The RCA Agreement

Defendant's legal argument that she has replaced KMI as a contracting party to the RCA Agreement is equally meritless. That argument is premised upon Paragraph 3 of the Assent, which provides as follows:

If, during the term of the Agreement, the Furnishing Party [*i.e.*, KMI] for any reason ceases to be entitled to the Artist's [*i.e.*, Defendant's] services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement or the Furnishing Party for any reason fails or refuses to furnish to RCA the Artist's services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement: (i) the Artist will be deemed substituted for the Furnishing Party as party to the Agreement, and (ii) she will render such services and perform such acts as will give RCA the same rights, privileges and benefits it would have received under the Agreement had the Furnishing Party continued to be entitled to the Artist's services and the results of the Artist's services as the Artist in accordance with the terms of the Agreement. Such rights, privileges, and benefits will be enforceable in RCA's behalf against the Artist.

Lepera Aff., Ex. 38, at p. 64, ¶ 3. Defendant claims she is entitled to this relief because as of October 16, 2015 – the date when her Counterclaims were filed – she had not recorded or delivered her music to KMI or to Kemosabe Records.

First and foremost, this claim is entirely moot and there is no justiciable, actual, and ongoing controversy that requires declaratory relief because Defendant has, by her own admission, “*continued performing* under” the KMI Agreement, as the First Department held in its May 29, 2018 Decision. Lepera Aff., Ex. 26, at p. 84 (emphasis added). In exchange for that performance, Defendant has requested, and been paid, the consideration specified by KMI under the KMI Agreement. Defendant commenced recording her third album in various studios in the fall of 2016. Lepera Aff., Ex. 39 and on December 7, 2016 sent formal written notice to KMI, pursuant to Section 3(c) of the KMI Agreement, that she had commenced recording. Lepera Aff., Ex. 40. On December 12, 2016, KMI confirmed that Defendant had been paid the contractually specified recording advance of \$150,000 pursuant to Section 3(c) of the KMI Agreement. Lepera Aff., Ex. 41. Defendant’s third album, entitled *Rainbow*, was thereafter released on or about August 11, 2017. Lepera Aff., Ex. 42, at p. 10. These undisputed facts moot this claim.

Second, Defendant’s claim is without merit as a matter of law because the Assent solely provides RCA (or its successor in interest Kemosabe Records) with the right to elect for Defendant to be substituted as a party to the RCA Agreement; it does not provide *Defendant* with the right to make that election. See Lepera Aff., Ex. 38, ¶ 3 (“Such rights, privileges, and benefits will be enforceable in *RCA’s behalf against the Artist.*”) (emphasis added). It is undisputed that Kemosabe Records has never purported to make that election, nor could it, given Defendant’s admitted performance under the KMI Agreement. Quite to the contrary, Kemosabe

Records has continued to recognize that KMI, and not Defendant, is the counterparty to the RCA Agreement. *See, e.g.*, Lepera Aff., Ex. 44 (May 4, 2018 letter from Kemosabe Records to KMI, exercising its option for Defendant's upcoming fourth album, and stating that Kemosabe Records "look[s] forward to continued success in our relationship with" KMI).¹³

V. KMI Is Entitled To An Award Of Prejudgment Interest On Late Royalty Payments

Plaintiffs' Third Cause of Action in the TAC asserts a claim for breach of the KMI Agreement based, *inter alia*, on Defendant's refusal "to fully and properly account for or pay in a timely manner KMI ancillary revenues which she owes or did owe under" the KMI Agreement. Lepera Aff., Ex. 1, Doc. 1539, ¶ 128.

Defendant cannot dispute that the KMI Agreement obligates Defendant to pay royalties to KMI on certain ancillary income within 45 days of her receipt of that income, or, in the case of tour receipts, within 30 days of the end of the applicable tour cycle. Lepera Aff., Ex. 49, ¶ 3. Nor can she dispute that, prior to August 2017, she had not paid any royalties to KMI since April 2012. Lepera Aff., Exs. 50-51. For the period from January 1, 2012 through December 31,

¹³ While the above undisputed facts are dispositive of this matter and require dismissal, it is worth noting that Defendant's own refusal to perform also precludes her from taking advantage of Paragraph 3 of the Assent. It is undisputed that Defendant was, for years, writing and recording music, but refusing to deliver it to KMI or RCA/Kemosabe Records. *See, e.g.*, Lepera Aff., Ex. 43, at 441:20-442:2. *A.H.A. Gen. Constr. v. N.Y.C. Hous. Auth.*, 92 N.Y.2d 20, 31 (1998) ("it is a 'well-settled and salutary rule that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself'" and "cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition"); *Nadar & Sons, LLC v. Shavolian*, 113 A.D.3d 432, 434 (1st Dep't 2014) ("a party cannot 'take advantage of a condition precedent, the performance of which he himself has rendered impossible'" (citation omitted)).

It is also worth noting the undisputed fact that Defendant's interpretation of this provision does not comport with music industry custom and practice, as explained by Plaintiffs' music industry expert Nancy Harkness. Lepera Aff., Ex. 45, ¶ 40-42. Defendant's music industry expert Owen Sloane did not contradict or disagree with Ms. Harkness on this point.

2016, Defendant admittedly owed KMI the amount of \$1,302,043.41. Lepera Aff., Ex. 52.¹⁴

However, it was not until August 7, 2017, after repeated demands and long after the amounts were due, that Defendant finally paid the amount of \$1,302,043.41. Lepera Aff., Exs. 54-55. Promptly after receipt of this payment, Plaintiffs notified Defendant that this money was only accepted as payment of the *undisputed* portion of the royalties owed by Defendant, and reserved the right to investigate and obtain additional royalties due and owed. Lepera Aff., Ex. 55. KMI further reserved the right to seek an award of pre-judgment on the entire amount Defendant had improperly withheld for years, including the belated payment of \$1,302,043.41. *Id.* Defendant, however, denies KMI's entitlement to such prejudgment interest, without any proper legal or factual basis.

Based on these indisputable facts, KMI is entitled to an award of prejudgment interest. Under New York law, "interest at the rate of 9% per annum is mandatory for 'sum[s] awarded because of a breach of performance of a contract.'" *Polyfusion Elecs., Inc. v. Promark Elecs., Inc.*, 108 A.D.3d 1186, 1187–88 (4th Dep't 2013) (quoting CPLR 5001(a)). Defendant cannot dispute that she breached the KMI Agreement by failing to pay at least \$1,302,043.41 in royalties. That Defendant tendered a payment for that amount while the parties were in the midst of litigating KMI's claim for unpaid royalties, rather than waiting for the Court to enter judgment on that claim, does not eliminate KMI's entitlement to prejudgment interest, because it accepted payment with a reservation of its right to seek prejudgment interest. *Kagan v. HMC-N.Y., Inc.*, 100 A.D.3d 468, 469 (1st Dep't 2012); *In re Hoffman*, 275 A.D.2d 372, 372-73 (2d Dep't 2000).

Pursuant to CPLR § 5001(b): "... [w]here ... damages were incurred at various times,

¹⁴ Based on the calculations of her own business manager in February 2017, she owed \$37,811.20 in royalties on income earned in 2012, \$752,420.62 in royalties on income earned in 2013, \$198,621.51 on income earned in 2014, \$125,116.67 on income earned in 2015, and \$215,073.41 on income earned in 2016. Lepera Aff., Exs. 52.

interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.” Here, Defendant’s failure to pay royalties occurred at various times throughout the four years between January 1, 2012 and December 31, 2016. It is therefore prudent to employ a single intermediate date in calculating the interest owed. *See, e.g., Solow Mgmt. Corp. v. Tanger*, 43 A.D.3d 691, 691 (1st Dep’t 2007); *City of N.Y. v. Coastal Oil New York, Inc.*, 2000 WL 648365, at *1 (S.D.N.Y. May 18, 2000). The Court should exercise “its discretion to treat each fiscal year’s [ancillary royalties] as a distinct bundle of damages, and for each fiscal year or portion thereof to set an intermediate date at its midpoint for the calculation of section 5001 prejudgment interest.” *Fresh Del Monte Produce Inc. v. Del Monte Foods Co.*, 933 F. Supp. 2d 655, 667 (S.D.N.Y. 2013); *accord Danka Office Imaging Co. v. Gen. Bus. Supply, Inc.*, 303 A.D.2d 883, 885 (3d Dep’t 2003). The interest should be calculated as accruing through the date of payment in August 2017. *See Kagan*, 100 A.D.3d at 469.

Using August of each year as an intermediate date for each year (and for ease of calculation), the prejudgment interest to which KMI is entitled is calculated as follows:

Year	Royalties Admittedly Owed	Accrued Prejudgment Interest
2012	\$37,811.20	\$17,015.04
2013	\$725,420.62	\$261,151.42
2014	\$198,621.51	\$53,627.81
2015	\$125,116.67	\$22,521.00
2016	\$215,073.41	\$19,356.61
<u>Total</u>	\$1,302,043.41	<u>\$373,671.88</u>

For these reasons, the Court should enter judgment in the amount of \$373,671.88 pursuant to CPLR § 5001, based on Defendant's late payment of \$1,302,043.41 in royalties owed pursuant to the KMI Agreement for the period of January 1, 2012 through December 31, 2016. This order should be without prejudice to Plaintiffs' right to seek prejudgment interest on other amounts obtained during the course of, and/or by a judgment in, this action.

VI. Many of Defendant's Affirmative Defenses to Plaintiffs' Defamation Claims Fail As A Matter Of Law

A. Defendant's Defamatory Statements Are Not "Protected Opinion"

Defendant's Twenty-First Affirmative Defense, which asserts that "the alleged defamatory statements are protected opinions" (Lepera Aff., Ex. 2, Doc. 1540, at p. 38), fails as a matter of law, and should be dismissed. "Whether a particular statement constitutes an opinion or an objective fact is a question of law." *Kamchi v. Weissman*, 125 A.D.3d 142, 157 (2d Dep't 2014) (citation omitted); *see also Gjonlekaj v. Sot*, 308 A.D.2d 471, 473 (2d Dep't 2003). "The dispositive inquiry, under ... New York law, is 'whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff.'" *Gross*, 82 N.Y.2d at 152 (citation omitted). This defense fails because Defendant's defamatory statements made what any reasonable reader would conclude to be *factual* assertions of criminal conduct—*i.e.*, that Gottwald drugged and raped Defendant, and that he raped Katy Perry.¹⁵

Indeed, "although expressions of opinion are constitutionally protected, accusations of

¹⁵ *See., e.g.,* Lepera Aff., Ex. 56, ¶ 23 ("Ms. Sebert later learned that the 'sober pills' Dr. Luke had given her were actually a form of gamma-hydroxybutyrate (GHB), more commonly known as the date rape drug, allowing him to bring Ms. Sebert back to his hotel room and rape her while she was unconscious."); Ex. 57 ("This lawsuit is a wholehearted effort by Kesha to regain control of her music career and her personal freedom after suffering for ten years as a victim of mental manipulation, emotional abuse and an instance of sexual assault at the hands of Dr. Luke."); Ex. 3, at p. 23 (defamatory text message sent by Defendant to Lady Gaga asserted that Katy Perry "was raped by the same man" as Defendant).

criminal or illegal activity, even in the form of opinion, are not.” *Silsdorf v. Levine*, 59 N.Y.2d 8, 16 (1983); accord *Hoffman v. Landers*, 146 A.D.2d 744, 746 (2d Dep’t 1989). It is undisputed that Defendant’s statements at issue in the First Cause of Action (*i.e.*, that Gottwald drugged and raped her Defendant) and in the Second Cause of Action (that Gottwald raped Defendant and Katy Perry), constitute accusations of criminal activity, and as such, they convey facts, not opinions. See *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 586 (2012) (“... a reasonable listener would have understood that defendants intended to label plaintiff as a child rapist. Hence, the statements would be actionable even if they were couched in the form of an opinion (‘I think plaintiff sexually assaulted my child’), rather than fact (‘plaintiff sexually assaulted my child’).”) (citing *Gross*, 82 N.Y.2d at 115). This affirmative defense should be dismissed.

B. Defendant’s Defamatory Statements Are Not “Rhetorical Hyperbole”

Defendant’s Thirty-Sixth Affirmative Defense contends that “Plaintiffs’ claims are barred in whole or in part because the alleged defamatory statements are rhetorical hyperbole.” *Lepera Aff.*, Ex. 2, Doc. 1540, at p. 39. Like Defendant’s “opinion” defense, this defense fails and should be dismissed.

“[A]n accusation of criminal conduct may be considered nonactionable rhetorical hyperbole only when no reasonable person would believe that the speaker was accusing the subject of an actual criminal offense or when the circumstances and general tenor of the remarks negate the impression of a factual assertion.” *Rossi v. Attansio*, 48 A.D.3d 1025, 1027 (3d Dep’t 2008) (collecting cases). Again, none of the statements which underlie Plaintiffs’ two causes of action for defamation in this action – all of which accuse Gottwald of committing the crime of rape – could be reasonably interpreted as anything other than factual assertions. These statements are not mere rhetorical flourishes, but instead plainly state, on their face, that Gottwald committed these heinous, illegal acts. *Gross*, 82 N.Y.2d at 155-56. This defense also

fails as a matter of law and should be dismissed.

C. The Statute of Limitations Does Not Bar Plaintiffs' Defamation Claims

Defendant's Twenty-Sixth Affirmative Defense, which asserts the statute of limitations, should be dismissed. Lepera Aff., Ex. 2, Doc. 1540, at p. 38. With respect to the First Cause of Action for Defamation in the TAC, this defense already was rejected by the Court. As the Court correctly and repeatedly recognized in its August 31, 2018 Order, all of the defamatory statements asserted in the First Cause of Action are timely. Lepera Aff., Ex. 58, Doc. 1537, *passim*. Plaintiffs' Second Cause of Action for Defamation is also timely. The statute of limitations applicable to defamation claims is one year. CPLR § 215(3). Defendant sent the Defamatory Text Message to Lady Gaga on February 26, 2016. Lepera Aff., Ex. 3, at p. 23. Plaintiffs timely moved for leave to assert the Second Cause of Action for Defamation based on this text message on January 30, 2017, within one year of its publication. Lepera Aff., Ex. 59, Doc. 621.

D. CPLR § 3016 Does Not Bar Plaintiffs' Defamation Claims

Defendant's Twenty-Seventh Affirmative Defense asserts that "Plaintiffs' claims ... are not pleaded with particularity as required by New York CPLR 3016." Lepera Aff., Doc. 1540, at p. 39. This Affirmative Defense is without merit. In opposing Plaintiffs' cross-motion for leave to file the TAC (Lepera Aff., Ex. 60, Doc. 1483, at p. 5], Defendant similarly argued that the TAC should be dismissed under CPLR 3016. Defendant's argument was properly rejected by the Court in granting the cross-motion, as the TAC plainly comports with Section 3016. In any event, the TAC undeniably contains sufficiently detailed allegations regarding each defamatory publication—in each instance, it pleads the actionable defamatory statement, the time of publication, the manner of publication, and the target of the publication. Lepera Aff., Ex. 1, TAC, ¶¶ 51-91, 97, 99-110.

E. Defendant's "Libel-Proof Plaintiff" Defense Fails As A Matter Of Law

Defendant's Thirty-Ninth Affirmative Defense asserts that "Plaintiffs' claims are barred ... under the libel-proof plaintiff doctrine." *Lepera Aff.*, Ex. 2, Doc. 1540, at p. 40. This fails as a matter of law. A "libel proof" plaintiff is someone who cannot be harmed by an alleged defamatory statement because the plaintiff's reputation has already been so damaged that further falsehoods do not cause *any* additional damage. *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 395 (S.D.N.Y. 1998). The doctrine "'reasons that when a particular plaintiff's reputation *for a particular trait*¹⁶ is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged in his reputation as to that trait.'" *James v. DeGrandis*, 138 F. Supp. 2d 402, 417 (W.D.N.Y. 2001) (citation omitted) (emphasis added). "... [T]he libel-proof plaintiff doctrine is to be sparingly applied, as it is unlikely that many plaintiffs will have such tarnished reputations that their reputations cannot sustain further damage." *Stern v. Cosby*, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009); *accord*, *Da Silva v. Time Inc.*, 908 F. Supp. 184, 187 (S.D.N.Y. 1995). "Whether a plaintiff is libel-proof is a question of law for the Court to decide." *Stern*, 645 F. Supp. 2d at 270.

Assuming (without conceding) this doctrine is even a viable defense under New York law, it cannot apply here because the undisputed evidence establishes Gottwald's reputation was

¹⁶ In opposition to this motion, Defendant likely will cite alleged evidence that certain recording artists purportedly had creative or business disagreements with Gottwald. Such disagreements are utterly irrelevant to the determination, as a matter of law, that Gottwald's reputation was not libel-proof with respect to the *traits* which Defendant accused Plaintiff of possessing in falsely claiming he raped her and Katy Perry, and drugged Defendant against her will.

harm by Defendant's defamation.¹⁷ *First*, Ms. Hudson and Ms. Tischker – a colleague of Gottwald's – testified that Defendant's false accusations of sexual assault were not consistent with Gottwald's character. Lepera Aff., Ex. 6, at 13:9-14; Ex. 61, at 108:8-109:4. *Second*, Ms. Hudson testified that she was unable to work with Gottwald on her latest album due to Defendant's accusations. Lepera Aff., Ex. 6, at 20:25-23:20. *Third*, Defendant's own experts conceded Gottwald was harmed by Defendant's accusations. Lepera Aff., Ex. 62, at p. 12 ("Mr. Erk's economic damages analysis is speculative and unreliable, because he ignores facts supporting the conclusion that any economic damages allegedly suffered by the Plaintiffs were caused by the filing of ... Kesha's complaint[] on the Litigation Date ..."); Ex. 63, at p. 9 ("On October 14, 2014, ... there was an immediate and significant spike in social-media traffic relating to Ms. Sebert's relationship with Mr. Gottwald, including references to the alleged rape."). Based on these undisputed facts, Gottwald cannot be deemed "libel-proof" as a matter of law.

VII. Many Of Defendant's Contract-Related Affirmative Defenses Fail As A Matter Of Law

A. The Statute of Limitations Does Not Bar Any of Plaintiffs' Contract Claims

Defendant's Twenty-Sixth Affirmative Defense contends that "Plaintiffs' claims are barred ... by the ... statute of limitations." Lepera Aff., Ex. 2, Doc. 1540, at p. 38. The statute of limitations on a breach of contract claim is six years. CPLR § 213(2). A claim for breach of contract accrues at the time of the breach. *Lebedev v. Blavatnik*, 144 A.D.3d 24, 28–29 (1st Dep't 2016). Plaintiffs allege various breaches of the KMI Agreement and the Prescription

¹⁷ There is a dearth of New York state cases addressing this doctrine, and as such, it is questionable whether it even applies to defamation actions brought in New York state courts. In addition, a number of courts within the Second Circuit have questioned whether the libel-proof plaintiff doctrine is valid under U.S. Constitutional principles. *See, e.g., Stern*, 645 F. Supp. 2d at 270 (collecting cases).

Agreement beginning in **2013**, meaning that the statute of limitations on such claims could not under any circumstance expire until **2019**. Lepera Aff., Ex. 1, TAC, ¶¶ 46-50. Plaintiffs' claims are not barred by the statute of limitations.

B. Defendant's Impossibility Affirmative Defense Fails as a Matter of Law

Defendant's Seventh Affirmative Defense alleges: "Plaintiffs' claims are barred in whole or in part because Defendant's performance under the contracts is or was made impossible and/or impracticable." Lepera Aff., Ex. 2, Doc. 1540, at p. 35. Defendant, however, previously sought leave to assert a counterclaim for a declaratory judgment that her contracts were terminated due to impracticability or impossibility. Justice Kornreich denied Defendant leave to assert this counterclaim, as it was meritless (Lepera Aff., Ex. 65, Doc. 809). The First Department affirmed, holding it "was speculative, contradicted by her own allegations that she had continued performing under the agreements and, as to at least one of the agreements, the impossibility was not produced by an unanticipated event that could not have been foreseen or guarded against." Lepera Aff., Ex. 26, at p. 84. The First Department's holding applies with equal force and effect to the Seventh Affirmative Defense.

C. Defendant's Seven Year Rule Defense Fails as a Matter of Law

In her Thirty-Second Affirmative Defense, Defendant yet again contends that "Plaintiffs' claims are barred in whole or in part because the alleged agreements are unenforceable under California Labor Code Section 2855," *i.e.*, the so-called "Seven Year Rule." Lepera Aff., Ex. 2, Doc. 1540, at p. 39. But Defendant previously sought leave from this Court to assert a counterclaim seeking to terminate the contracts under the "Seven Year Rule." Lepera Aff., Ex. 65, Doc. 809, at p. 2. Justice Kornreich properly denied Defendant leave to assert this claim as patently meritless. *Id.*, at 10. The First Department affirmed, holding "the unambiguous New York choice-of-law provisions contained in the agreements preclude the application of that

California statute.” Lepera Aff., Ex. 26, at p. 84. The First Department’s decision bars the Thirty-Second Affirmative Defense.

D. Defendant Cannot Establish that the KMI Agreement or the Prescription Agreement Is Unconscionable

Defendant’s Third-Third Affirmative Defense claims that “Plaintiffs’ claims are barred in whole or in part because the alleged agreements are unconscionable.” Lepera Aff., Ex. 2, Doc. 1540, at 39. “A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable *when made*, i.e., ‘some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” *Wachovia Sec., LLC v. Joseph*, 56 A.D.3d 269, 270 (1st Dep’t 2008) (emphasis added) (quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988)). An unconscionable contract is one that “is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable [*sic*] according to its literal terms.” *Gillman*, 73 N.Y.2d at 10 (citation omitted).

Here, Defendant cannot establish either form of unconscionability. First, “[t]o establish procedural unconscionability, a party needs to establish the presence of certain elements during the transaction such as deceptive or high-pressured tactics, the use of fine print in the contract, a lack of experience and education and a disparity in bargaining power.” *Dabriel, Inc. v. First Paradise Theaters Corp.*, 99 A.D.3d 517, 520 (1st Dep’t 2012) (citation omitted). None of these elements were present here. Defendant was undisputedly represented by experienced entertainment lawyers in negotiating of the KMI Agreement, the two completed amendments to the KMI Agreement, and the Prescription Agreement. Lepera Aff., Exs. 47-49, 66; *Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 A.D.3d 456, 456 (1st Dep’t 2010).

Second, Defendant cannot establish that either the KMI Agreement or the Prescription Agreement was substantively unconscionable at the time it was entered into. *Mazursky Grp., Inc. v. 953 Realty Corp.*, 54 Misc. 3d 1221(A), 54 N.Y.S.3d 610 (N.Y. Sup. Ct. 2017). Defendant's *own music-industry expert* admitted that the Agreements are standard music industry agreements for an artist of Defendant's stature at the time she entered into them. *See, e.g., Lepera Aff., Ex. 42*, at p. 5; *id.*, at p. 7. Accordingly, as a matter of law, Defendant cannot assert the Agreements are unconscionable.

E. Defendant Cannot Establish Her Purported Fraudulent Inducement Defense

Defendant's Eighth Affirmative Defense asserts that "Plaintiffs' claims are barred in whole or in part because Kesha was fraudulently induced to enter into the contracts with Plaintiffs." *Lepera Aff., Ex. 2, Doc. 1540*, at p. 36. This defense fails as a matter of law. In order to set aside a contract based on a claim of fraudulent inducement, Defendant "must establish the basic elements of fraud, namely a *representation of material fact*, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dep't 2006) (emphasis added). Here, there is absolutely no evidence that Plaintiffs made any false representations of material *fact* in connection with the execution of either the KMI Agreement or the Prescription Agreement, much less that Defendant justifiably relied on any such representation. Defendants' Eighth Affirmative Defense should be dismissed.

Nonetheless, Defendant may argue that she was fraudulently induced into entering into the KMI Agreement based on her disputed contention that: "Dr. Luke had told me that, after my first record, if it was a big success ... we would renegotiate." *See, e.g., Lepera Aff., Ex. 67*, at

158:8-12.¹⁸ However, a “promise to perform a future act” does not constitute a representation of material fact, and accordingly is “nonactionable.” *Nastro Contr., Inc. v. Agusta*, 217 A.D.2d 874, 875 (3d Dep’t 1995). Moreover, in the KMI Agreement, Defendant disclaimed reliance upon any representations (such as Gottwald’s alleged promise) that were made during negotiations. *Lepera Aff.*, Ex. 47, ¶ 10(c); *Montchal v. Northeast Sav. Bank*, 243 A.D.2d 452, 453 (2d Dep’t 1997).

CONCLUSION

As set forth above, a number of issues in this case are undisputed. Plaintiffs respectfully request the Court grant their motion for partial summary judgment on these undisputed issues.

DATED: October 18, 2018

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Christine Lepera
Christine Lepera (ctl@msk.com)
Jeffrey M. Movit (jmm@msk.com)
437 Madison Avenue, 25th Floor
New York, New York 10022
Tel: (212) 509-3900
Fax: (212) 509-7239

*Attorneys for Lukasz Gottwald p/k/a Dr. Luke,
Kasz Money, Inc., and Prescription Songs, LLC*

¹⁸ Gottwald denies making any such promise. *See, e.g., Lepera Aff.*, Ex. 5, at 330:18-20.